1963

State of Utah v. Roland Dean McQueen : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

ROLAND DEAN McQUEEN,
Defendant and Appellant.

Case
No. 9850

BRIEF OF RESPONDENT

Appeal From the Judgment of the Third District Court
for Salt Lake County
HON. MARCELLUS K. SNOW, *Judge*

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— vs. —
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BRIEF OF RESPONDENT

NATURE OF CASE

The appellant, Roland Dean McQueen, was convicted upon a jury trial of the crime of robbery in violation of 76-51-1, U.C.A. 1953, and appeals from the judgment of conviction.

DISPOSITION IN LOWER COURT

The appellant was tried jointly with George A. Dewitt in the Third District Court, Salt Lake County, for the crime of robbery. After jury trial and a verdict of guilty being returned, the Honorable Marcellus K. Snow, Judge, committed the defendant to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent submits the appellant's conviction should be affirmed.

STATEMENT OF FACTS

On July 20, 1962, two men entered the rear of the Great Basin Food Service in Salt Lake at approximately 3:00 a.m. in the morning (R. 49-52). One man had a handkerchief over his nose and wore black kid gloves (R. 52). The other also had a handkerchief over his nose, but wore gloves with a cuff (R. 56, 74). Both were apparently wearing levis (R. 74-75). One of the men wore a pair of light moccasins (R. 76). One man was taller, with a small face and carried a rifle (R. 69). The other, smaller man, was lighter and apparently unarmed (R. 69). As they entered, Kate Zimmerman, an employee of the Great Basin Food Service, called for help (R. 68). The smaller man took a butcher knife off the table (R. 67, 52). One of the men told Mrs. Zimmerman to "hold it." (R. 52, 68) Thereafter, the only other employees working at the time, Duane Keetch, Marjorie Pool and Pat Trujillo, entered the room (R. 50-54). The men asked where the money was kept, the short man started through the building, and then the robbers locked the four employees in a food locker (R. 52, 54, 78). Thereafter, approximately fifteen minutes later, they were removed from the food locker and locker in a wire cage where they remained until they were released by a delivery man (R. 55).

Pat Trujillo, one of the employees, had two dollars in her purse prior to the robbery. She left her purse

unattended and upon being released discovered a clock near her purse had been knocked over and that the two dollars that had been in her purse was gone (R. 86).

Although all the employees were scared, they identified the appellant and George A. DeWitt as the robbers (R. 68-70), and the gloves (Exhibit 4) of appellant were identified as the ones worn by one robber (R. 102). The moccasins were worn by DeWitt (R. 104), who was apparently the other robber.

Officer Sexton of the South Salt Lake Police, took a statement from the appellant wherein he admitted the robbery, and that he took the two dollars from Pat Trujillo's purse (Exhibit 2).

The appellant at trial was defended by Kenneth Rigtrup, a duly licensed attorney, and his companion, DeWitt, was defended by Robert McRae, also a licensed attorney (R. 39). Originally, Mr. McRae was appointed to defend both accused, and did handle both accuseds' cases through arraignment up to just before trial (Supp. R. 2). Approximately two days before trial, the appellant "*fired*" Mr. McRae, apparently because he could not obtain a continuance (Supp. R. 2). The court then appointed Mr. Rigtrup, who conferred with Mr. McRae and the appellant. Mr. McRae noted for the record (Supp. R. 7):

> "We discussed this matter from seven until eight thirty last night as well as on the telephone yesterday afternoon. I advised Mr. Rigtrup every-

thing that I felt I knew about the trial and to the best of my ability I did. Now, as to what his abilities in view of the short notice to defend this matter, I leave to the discretion of the Court. So far as my client is concerned who is still incarcerated in the County Jail, I would resist any joint motion for a continuance. If the Court desires to extend Mr. Rigtrup and his client the concession of a separate trial and continuance, that's the discretion of the Court."

The appellant stated in his own language why he wanted a continuance. It had nothing to do with the merits of his guilt or innocence, but rather was merely to delay with hope of impressing the Board of Pardons (Supp. R. 3). Appellant stated:

> "Well, what we talked about was to get out on bond and get it postponed for a year, year and a half so I could prove to the Court and Board of Pardons & Parole if I am found guilty of it that I can get a job and keep my nose clean and keep out of trouble and realize I have a responsibility now. * * *"

During the course of the trial Mr. Rigtrup actively participated, and as to the identity of the appellant, made a careful cross-examination (R. 61-63).

Finally, although appellant attempts to incorporate a record of another case into the instant appeal (*State* v. *Louden*, No. 9851), no part of that record was certified on appeal, heard by the trial court, nor does it even involve the same crime.

ARGUMENT

POINT I.

THE COURT DID NOT COMMIT ERROR IN REFUSING TO GIVE AN INSTRUCTION ON CORROBORATION OF THE APPELLANT'S CONFESSION.

In appellant's first point just exactly what his contention is is obscured because of a misstatement. He indicates that the trial court gave an instruction on corroboration of a confession to which appellant excepted (App. Brief p. 8). This is erroneous, and what he is apparently attempting to say is that appellant requested the court to give the instruction set out in his brief, which was refused and to such refusal an exception was taken (Supp. R. 3, 4).

If this is appellant's point, it is submitted that the trial court committed no error in rejecting the proffered instruction. It is submitted (1) that the proffered instruction was not a correct statement of the law, (2) that no instruction was necessary, and (3) that no prejudice could conceivably have resulted.

First, it is a generally recognized principle that the court need not give an instruction in the language of the request, nor is the court obligated to give an instruction which is erroneous. *State* v. *Chadwick,* 7 Utah 134, 25 Pac. 737 (1891); *State* v. *Campbell,* 116 Utah 74, 208 P. 2d 530 (1949). In the instant case, the requested instruction on corroboration of an accused's confession was not a proper statement of the law. The proffered instruction

would have required the jury to find "additional corroborative evidence tending to prove that one or both of the *defendants committed the crime of robbery.*" This is more than is necessary to corroborate a confession. Normally, all that is required is sufficient evidence to show, independent of the confession, a corpus delicti. *State* v. *Weldon,* 6 U. 2d 372, 314 P. 2d 353 (1957). It need not show that the particular defendant or defendants committed the crime. Thus, in 45 ALR 2d 1336, it is noted:

> "The courts agree that as a general proposition, evidence in corroboration of a confession or admission need not connect the defendant with the crime charged and that such connection can be shown by his confession or admission without corroboration on that point. * * *"

This court in *State* v. *Johnson,* 95 Utah 572, 83 P. 2d 1010 (1938) noted the same rule, where it was said:

> "Proof that a crime has been committed by *some one* is certainly corroborative of a confession by a defendant that he committed the crime, for it establishes the existence of a fact included in the crime confessed and essential to his guilt. * * *" (Emphasis supplied)

In *Williams* v. *Commonwealth,* 306 Ky. 225, 206 S.W. 2d 922 (1947), the accused raised the same contention, and the Kentucky Court of Appeals rejected the argument that such an instruction was proper. It noted that corroboration need only show a crime, but need not connect the defendants to it. The court stated:

> "It has been repeatedly held that an instruction under Section 240 is not proper or required where

the corpus delecti has been sufficiently established by other evidence than the defendant's confession, *and that it is not necessary in order to sustain a conviction that there be evidence tending to connect the accused* with its commission * * *." (Emphasis supplied)

In *Manning* v. *United States,* 215 F. 2d 945 (10th Cir. 1954), the court noted:

> "And by the great weight of authority evidence of his identity as the criminal and his connection with the crime is not part of the '*corpus delicti.*' "

The court correctly noted that to hold to the contrary would place the burden on the prosecution of proving *all* the elements of the crime by independent evidence, and thus, it is arguable, that such an instruction would mislead the jury. As a consequence, there was no error in not giving the requested instruction. *Sheffield* v. *State,* 188 Ga. 1, 2 S.E. 2d 657 (1939).

Although appellant merely claims, somewhat ambiguously, that it was error to fail to give the requested instruction, it is submitted that no instruction on the subject was in fact necessary. In *State* v. *Weldon,* 6 U. 2d 372, 314 P. 2d 353 (1957), this court noted the purpose of the corpus delicti or corroboration rule:

> "* * * The purpose of the rule was to safeguard against convicting the innocent on the strength of false confessions. It appears that there were several actual cases where persons innocent of the crime were convicted of murder and executed and the supposed victims later appeared alive."

In *State* v. *Ferry*, 2 U. 2d 373, 275 P. 2d 173 (1954), this court stated the essence of the corroboration requirement on laying a corpus delicti sufficient to support a conviction with a confession:

> "An accused cannot be convicted on his confession alone. We believe and hold that in addition there must be independent, clear and convincing evidence of the corpus delicti, although we and the authorities generally do not require it to be convincing beyond a reasonable doubt."

Another statement of the general rule is noted in Abbott, Criminal Trial Practice, 4th Ed., Sec. 337:

> "In order to have sufficient corroboration for a confession, *the only requirement* is that there be other facts and circumstances in evidence strengthening and confirming fact that crime has been committed with which accused identifies himself by his confession." (Emphasis supplied)

In the instant case the evidence clearly shows two men entered the Great Basin Food Service, one carrying a rifle, both masked. They asked where the money was kept, locked the employees in a locker, searched the premises, removed two dollars from employee Pat Trujillo's purse, and finally reimprisoned the employees in a cage of the premises and fled. No part of the corpus delecti was uncertain as to the fact of a crime having been committed. It was clear that robbery had been committed. The appellant offered no contradictory testimony, nor was any objection as to the sufficiency of the corpus delicti ever raised in the trial court, except by way of offering an

instruction, the obvious purpose of which was to mislead the jury into thinking the confession was not sufficient as to identity. It is submitted that under these circumstances there was no reason to give an instruction on corroboration for the confession. The general rule is noted is 23A C.J.S., Criminal Law, Sec. 1231:

> "The court should properly instruct as to the law governing, or requiring, corroboration of an extra-judicial confession or admission, but a failure to do so is not error where the confession is amply corroborated. Where a confession need be corroborated only as to the corpus delicti to support a conviction, and the corpus delicti has been clearly proved, it is not necessary to instruct that an extra-judicial confession or admission will not justify a conviction unless accompanied by proof of the corpus delicti; but, where it is doubtful whether a crime has been committed at all, the jury should be so instructed. * * *"

See also 53 Am. Jur., Trial, Sec. 737:

> * * * But, it has been held, it is unnecessary to instruct as to the rule requiring corroboration of a confession where the evidence, apart from the confession, fully establishes the corpus delicti."

In *Dunn* v. *Commonwealth,* 350 S.W. 2d 709 (Ky. 1961), the appellant was charged with burglary, and raised on oppeal the failure of the trial court to instruct upon corroboration of his confession to support the corpus delicti. The court rejected the contention, noting:

> "This court has consistently held that where the corpus deliciti has been established by evidence other than the alleged confession of the defendant,

which was done in this case, it is unnecessary to instruct under the foregoing Code section."

Numerous cases have held that where the corpus delicti is adequately proved, that it is not error to refuse to give an instruction to the jury. *People* v. *Travis,* 129 C. A. 2d 29, 276 P. 2d 173 (1954); *People* v. *Wilde,* 82 C. A. 2d 879, 187 P. 2d 825 (1954); *Wood* v. *State,* 142 Tex. Cr. 282, 152 S.W. 2d 35. Recently, the Supreme Court of Hawaii, *State* v. *Hale,* 367 P. 2d 81 (Haw. 1961), discussed at length the necessity for an instruction on corroborating an accused's confession. In affirming the conviction, the court noted the instance when an instruction should be given:

> "Upon consideration of the rule established in Yoshida, we have concluded that when, by reason of incompleteness of the independent evidence, conflicts in the testimony, impeachment of witnesses ,or other similar reasons, the confession is or may be a crucial part of the proof of the corpus delicti, it is within the province of the jury to determine whether the independent proof shows the confession to be trustworthy. * * * We also are of the view that an instruction on corroboration is not required in every case. * * *"

Since in the instant case the evidence establishing the corpus delicti is uncontradicted and complete, no basis for an instruction existed, and the court quite properly did not instruct on the matter.

Finally, courts have held that even where an instruction may be proper, if there is substantial additional evidence making out the corpus delicti, no prejudice from

the failure to give an instruction can be claimed. *People* v. *Chan Chaun,* 41 C.A. 2d 586, 107 P. 2d 455.

POINT II.

THE EVIDENCE OF CORPUS DELICTI IS SUFFICIENT TO CORROBORATE THE APPELLANT'S CONFESSION.

The appellant contends the evidence of corpus delicti was insufficient to corroborate his confession to the crime. Reliance for such a view is placed on *State* v. *Wells,* 35 Utah 400, 100 Pac. 681 (1909). Reliance upon this case is misplaced to the degree it is contended that the corpus delicti must be proved beyond a reasonable doubt since in *State* v. *Johnson,* 95 Utah 572, 83 P. 2d 1010 (1938), the Wells rule was abandoned. Thus, in *State* v. *Ferry,* 2 U. 2d 371, 275 P. 2d 173 (1954), the court noted:

> In State v. Wells, 1909, 35 Utah 400, 100 P. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631, we held the independent evidence must prove the corpus delicti beyond a reasonable doubt; in State v. Johnson, 1938, 95 Utah 572, 83 P. 2d 1010, we softened that rule by saying such proof need not be conclusive; we ennunciate the rule in our present decision, to clarify the matter, feeling that such rule, already announced in Arizona in Burrows v. State, 8 Ariz. 99, 297 P. 1029, is the soundest of those heretofore enunciated by the authorities. See also, State v. Crank, 1943, 105 Utah 332, 142 P. 2d 178, 170 A.L.R. 542."

The rule now in effect in this state is that the corroboration for corpus delicti need only be "independent,

clear and convincing." *State* v. *Ferry*, supra; *State* v. *Weldon*, 6 U. 2d 372, 314 P. 2d 353 (1957). Applying this standard to the instant case, it is clear that the evidence is amply sufficient to make out a corpus delicti. Appellant argues that the evidence is not sufficient to show a taking of personal property. Clearly there is no merit to this assertion, since Pat Trujillo testified that she bought some shrimp prior to the robbery, she had $2.00 in her purse at the time of the robbery, that a clock near her purse was knocked over and the money gone. Additionally, the evidence is overwhelming that the appellant searched the building in an effort to find money to steal. Consequently, no merit at all to appellant's position exists on this point.

POINT III.

APPELLANT MAY NOT COMPLAIN OF ANY ILLEGAL SEARCH AND SEIZURE SINCE:

A. NO EVIDENCE OF ANY SUCH ACTIVITY APPEARS OF RECORD.

B. NO ISSUE WAS RAISED BEFORE THE TRIAL COURT AND APPELLANT HAS, THEREFORE, WAIVED THE ISSUE.

C. NO EVIDENCE PROCURED BY ANY ILLEGAL SEARCH WAS BEFORE THE JURY.

A. Appellant has attempted to incorporate by reference the record in the case of *State* v. *Louden*, No. 9851, and thereby raise an issue of search and seizure. No part of the evidence in the Louden record was ever placed before the trial court, nor certified as part of the record

on appeal. Consequently, no part of that record is considerable by this court in deciding the instant case, and the issue may not be raised for the first time on appeal. Rule 77-39-12, U.R.Cr.P. as amending 77-39-12, U.C.A. 1953; *People* v. *Callaghan,* 4 Utah 49, 6 Pac. 49; *State v. Angle,* 61 Utah 432, 215 Pac. 531; *State* v. *Kinder,* 381 P. 2d 82 (Utah 1963).

B. No issue of any illegal search and seizure was ever raised in the trial court, during trial or by pre-trial motion. Although this court has not passed on the mater nor promulgated a rule of procedure on the appropriate way to proceed,[1] courts from other jurisdictions have generally held that an objection must be made either before trial or during trial in order to preserve the question of an illegal search for appellate review. 24 C.J.S., Criminal Law, Sec. 1672d comments:

> "If no objection is made in the trial court to the reception of evidence on the gound that it was wrongfully obtained, as, by illegal search and seizure, or in the course of a claimed illegal arrest, or by wire tapping or other violation of state or federal communication acts, the generally recognized rule is that the reviewing court will not consider such contention when it is raised for the first time on appeal * * *."

In *Gendron* v. *United States,* 295 F. 2d 897 (8th Cir. 1961), the court ruled:

> "On the search and seizure issue, defendant did not at any time make a motion to suppress the

[1] See generally Rule 41(e) F.R.Cr.P.; Rule 41(e) Colo. R. Cr. Procedure, 34 Rocky Mountain L. Rev. 86 (1962).

stolen bonds as evidence on the ground that they were unlawfully seized, in the manner required by Rule 41(3), Federal Rules of Criminal Procedure. Defendant likewise made no objection to the Government's offer of such bonds in evidence. In fact, when the Government offered said bonds in evidence, defendant's counsel stated, 'No objection.' Accordingly, there is no ruling of the trial court upon the admission of the bonds in evidence or upon the search an dseizure issue here for us to review. Billeci v. United States, 9 Cir., 290 F. 2d 628, 629."

When the United States Supreme Court again recognized the exclusionary rule in federal cases in *Weeks* v. *United States,* 232 U. S. 383, they ruled that the illegality of the evidence would have to be passed upon by pretrial motion. Later the condition was modified where the defendant had no prior knowledge of the illegality of the search before trial, *Gould* v. *United States,* 255 U. S. 298, and further that a motion at trial would be proper if there was no dispute as to the facts, *Agnello* v. *United States,* 269 U. S. 20; however, some objection would have to be made before conclusion of the case. Since no objection was made in the instant case, no basis for appellate review is available and the appellant must be deemed to have waived any objection.

C.[2] Even if it were admitted that there was an illegal search and seizure, appellant fails to show how he was injured by it. The comparison of the Londen record with the instant record does not reveal that any of the evidence

[2] The State submits there was no illegal search and seizure in *State* v. *Louden.* See Respondent's Brief, *State* v. *Louden,* No. 9851.

obtained by any search was used in this case or that it led to any evidence used in this case. Nor does appellant in his brief show such a connection. Unless the search culminated in producing evidence used against the accused, no harm can be claimed. *Nardone* v. *United States*, 308 U. S. 38, 341.

There is, therefore, no basis procedurally or substantively to the appellant's claim.

POINT IV.

APPELLANT HAS NO BASIS TO SEEK REVERSAL BECAUSE OF ANY ILLEGAL ARREST SINCE:

A. THE CIRCUMSTANCES OF THE ARREST WERE NOT BEFORE THE TRIAL COURT NOR THE ISSUE RAISED BELOW.

B. SUCH CLAIM WOULD AFFORD NO BASIS FOR REVERSAL OF APPELLANT'S CONVICTION.

A. The appellant contends that the conviction should be reversed because appellant's arrest was illegal. Appellant apparently bases this on the Louden record which is not properly before the court, nor was the substantive issue raised in the trial court. Consequently, it is not now properly before this court on appeal. *People* v. *Northrup*, 21 Cal. Rptr. 448, 203 ACA 498 (1962).

B. Even were the issue before the court, it would afford appellant no relief. An illegal arrest prior to trial

is no basis to attack the court's decision convicting him of a crime. In *Washington* v. *Renouf,* 5 U. 2d 185, 299 P. 2d 620 (1956), the appellants sought release *prior to* trial based upon their illegal arrest and transportation to Utah for trial. The court denied relief, noting that although the original arrest may be illegal, if the prisoner is held by proper legal process, thereafter he may not complain. Thus, the court noted:

> "The U. S. Supreme Court has held in numerous instances that no U. S. Constitutional provisions are violated by illegal, improper, or unlawful means of obtaining jurisdiction over the person of the accused where he is held under proper process. * * *"

If the appellant had in fact been illegally held, he may have obtained relief at that time, but now having been convicted, he may not complain since he is properly held.

Appellant does not contend that any evidence was illegally taken from him or that he sustained any prejudice by his detention. Nor does appellant cite 77-12-14, U.C.A. 1953, requiring that a person arrested be taken forthwith before a magistrate. Even if this were not done in this case, it could not vitiate the conviction in the absence of a showing that it in some way deprived him of a fair trial. *People* v. *Guarino,* 132 P. 2d 59 (1953); *People* v. *Hightower,* 11 Cal. Rptr. 198, 189 C.A. 2d 309 (1961); *People* v. *Jackson;* 6 Cal. Rptr. 884, 183 C.A. 2d 562 (1960); *People* v. *Boyd,* 21 Cal. Rptr. 444, 203 ACA

363 (1962). In *People* v. *Imbler,* 21 Cal. Rptr. 568, 371 P. 2d 304 (1962), the California Supreme Court noted:

> "Defendant contends that his conviction must be reversed because he was taken into custody on January 14, 1961, but was not informed of the charges against him until the following February 14. Defendant was legally in custody during this time because he had pleaded guilty to the robbery in Pomona. Although he should have been taken before the magistrate on the murder charge within the time limit prescribed in Penal Code section 825, the failure to do so is not a ground for reversing the conviction. * * *"

See also *State* v. *Gardner,* 119 Utah 579, 230 P. 2d 559 (1951), where this court ruled that even though the accused had not been taken before a magistrate as required by 105-12-14, U.C.A. 1943 (77-12-14, U.C.A. 1953), it would not compel exclusion of his confession obtained during this time.

Consequently, the point raised is manifestly without merit.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING APPELLANT A CONTINUANCE.

The appellant contends that this court should reverse his conviction on the grounds that his counsel at trial was not given adequate time for preparation. The facts on this point show that a warrant for arrest of the appellant was issued on August 17, 1962, based upon a complaint dated July 20, 1962 (R. 3, 6). A preliminary hearing on

the complaint was held on August 17, 1962, and the appellant was present and represented by Robert McRae (R. 2). An information was duly filed against appellant by the District Attorney on August 29, 1962 (R. 7). Mr. McRae coontinued to represent the appellant, and on September 4, 1962, the appellant was arraigned and plead not guilty. The appellant was out on bond of $2500.00 from the time of arraignment (Supp. R. 2). On October 10, 1962, appellant's attorney, Mr. McRae, was advised that the trial would be on November 8, 1962. He attempted to advise the appellant, who had left Utah and gone to Nebraska, of the impending trial date. On about November 6, 1962, the appellant entered his attorney's office and said he wanted a continuance (Supp. R. 2). Because counsel indicated he did not believe he could get a continuance, the appellant "fired" Mr. McRae and said he would get counsel (Supp. R. 2, 3). Mr. McRae thereafter notified the court and Kenneth Rigtrup was immediately appointed for appellant. Mr. Rigtrup discussed the case with Mr. McRae for about 1½ hours, informed him of the anticipated proof, and the possible defenses. Mr. Rigtrup had some consultation with his client also (Supp. R. 6-8). On November 8, 1962, a motion for continuance was made by appellant. His reasons, as distinct from counsel's, for wanting the continuance, were expressed as follows (Supp. R. 3):

> "Well, what we talked about was to get out on bond and get it postponed for a year, year and a half so I could prove to the Court and Board of Pardons & Parole if I am found guilty of it that I can get a job and keep my nose clean and keep out

of trouble and realize I have a responsibility now. * * *''

The court's response was as follows (Supp. R. 5):

> "In any event, it's been almost four months since the alleged commission of this offense and that's plenty long enough. This matter should be heard right away. Those matters you discussed just now in court, Mr. McQueen, as far as you making good and getting a job, those are matters to discuss with the probation department at such time as that is available to you. We can't have a continuance on the merits in connection with this trial over long periods to prove the good intentions of the defendants.''

The court denied the motion for continuance. Appellant went to trial represented by Mr. Rigtrup, along with his co-defendant, George DeWitt, who was represented by Mr. McRae. Both Mr. Rigtrup and Mr. McRae cross-examined witnesses and made objections, apparently without specific reference to their individual clients. Upon conclusion of the very conclusive case for the State, the defense for both men rested (R. 110) without putting on additional evidence. Based on the above, it is submitted that the trial judge did not abuse his discretion in denying a continuance.

In *State* v. *Mathis,* 7 U. 2d 100, 319 P. 2d 134 (1957), this court noted:

> "The request for continuance is addressed to the sound discretion of the trial court and unless there is plain abuse its ruling will not be disturbed. * * *''

This court has repeatedly followed the rule that the trial judge will only be held to have erred if in exercising his discretion he went beyond the bounds of reason and thus denied the accused an opportunity for a fair trial. *State* v. *Fairclough,* 86 Utah 326, 44 P. 2d 692 (1935); *State* v. *Green,* 89 Utah 437, 57 P. 2d 750 (1936); *State* v. *Hartman,* 101 Utah 298, 119 P. 2d 112 (1941); *State* v. *Williams,* 49 Utah 320, 163 Pac. 1104 (1917); *State* v. *Cano,* 64 Utah 87, 228 Pac. 563 (1924); *State* v. *Anselmo,* 46 Utah 137, 148 Pac. 1071 (1915). This is the rule of general application in this country, and the courts have ruled that this is true even where the claim of insufficient time for preparation is made. *Prescott* v. *State,* 56 Okl. Cr. 259, 37 P. 2d 830 (1934); *State* v. *Badgley,* 140 Kan. 349, 37 P. 2d 16 (1934).

In *State* v. *Pendervill*e, 2 U. 2d 281, 272 P. 2d 195, (1954), this court cautioned as to the right of a defendant to use a constitutional right, not as directly raised here, to delay or obstruct trial. The court noted:

> "* * * An accused may not, however, having once elected to proceed with the aid of counsel for purposes of delay or to obstruct the proceeding against him advance successfully an insincere claim of his right to defend in person. * * *"

By the same token, an accused who is bent on continuance for no motive reasonably connected with his trial should not be allowed to "fire" counsel and claim lack of preparation, thereby bringing into fruition a continuance that would otherwise be without merit. In *People* v. *O'Neill,* 179 P. 2d 10 (Cal. App. 1947), the defendant

claimed he was denied the right of counsel. The court noted that just before trial the accused fired the public defender, and elected to proceed without counsel. The court, in rejecting the constitutional claim, stated, however:

> "* * * Appellant did not ask for a continuance for the purpose of obtaining counsel and if he had done so the trial court would not have erred in the circumstances existing here in refusing to grant the request. * * *"

In *People* v. *Meades,* 219 P. 2d 1 (Cal. 1950), the California Supreme Court rejected a contention that the trial court abused its discretion in denying a continuance in a murder case. The court in doing so noted that although trial counsel had just recently been retained, he had the benefit of assistance of counsel who had been connected with the case for sometime earlier. In the instant case, Mr. McRae was present and in effect assisted, and thus "newly retained" counsel had the benefit of counsel who had ample time to familiarize himself with the case.

In *State* v. *Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948), the accused was convicted of rape after a plea of not guilty. He was arrested September 13, 1948, arraigned the same day and counsel appointed. Counsel consulted with his client and trial was set for the afternoon of the next day. On appeal the North Carolina Supreme Court affirmed, noting:

> "While the circumstances lend some color to the argument that trial was had in the court below with regrettable dispatch, we must perform our function as an appellate court with due regard for

the fundamental and indispensable rule that the record must not only show error, but also that the appellant was prejudiced thereby. * * * [Note a similar requirement 77-42-1, U.C.A. 1953] Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power. Relevant deisions compel the conclusion that an abuse of discretion has not been made manifest in the case at bar. * * *"

In *Roth* v. *State,* 70 Ga. App. 93, 27 S.E. 2d 473, the court ruled 20 minutes to be adequate time for preparation in a bigamy case not presenting any unusual or complex issues. In the instant case, no complexity is shown, and although appellant attempts to make some claim to possible illegal search and seizure, the lack of evidence procured in this case as a result of such a search, nor any attempt by co-counsel to raise the issue, obviously shows its lack of merit.

Numerous cases similar to this case where an abuse of discretion has not been found can be cited; among a few are: *State* v. *Cano,* 64 Utah 87, 228 Pac. 563 (1924); *Cannady* v. *State,* 190 Ga. 227, 9 S.E. 2d 241; *State* v. *Hendricks,* 66 Ariz. 235, 186 P. 2d 943; *People* v. *McNabb,* 3 Cal. 2d 441, 45 P. 2d 334; *People* v. *Shaw,* 46 Cal. 2d 768, 117 P. 2d 34; *State* v. *Gallo,* 128 N. J. Law 172, 24 A. 2d 557; *Thompson* v. *State,* 51 Ga. App. 5, 179 S.E. 200; *State* v. *Wilson,* 181 La. 61, 158 So. 621; 22A C.J.S., Criminal Law, Sec. 496, p. 155. In the instant case the accused

fired counsel, had no substantial reason for a continuance, and was adequately defended, and under these circumstances no abuse eof discretion can be claimed. To allow the accused to so claim would give court assistance to self-induced error.

CONCLUSION

Appellants' contentions on appeal, though multiple, are unusually unmeritorious, and this court should affirm.

Respectfully submitted,

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